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No. 84-1044

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

**BRIEF OF
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
AS AMICUS CURIAE**

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**BRIEF OF
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
AS *AMICUS CURIAE***

Consolidated Edison Company of New York, Inc. (Con Edison) respectfully submits this brief as *amicus curiae* in support of appellant Pacific Gas and Electric Company (PGandE) and urges that the judgment of the Supreme Court of California be reversed because it violates PGandE's freedom of speech guaranteed by the First Amendment to the United States Constitution.¹

Interest of Amicus Curiae

Con Edison is an investor-owned utility that provides electric, gas and steam service in various parts of New York City and Westchester County in New York State. As a public utility, Con Edison is subject to regulation by the Public Service

¹Pursuant to Rule 36.2, there have been filed with the Clerk the written consents of all parties to the case.

Commission of the State of New York (New York PSC) in the conduct of its utility business.

Con Edison believes that the First Amendment secures to it both the right to speak freely on public issues and the right to remain silent about such issues, and it is committed to protecting these rights against unlawful governmental interference.

Con Edison was the appellant in *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980) (*Con Edison v. PSC*), the case in which this Court invalidated, as violative of the First Amendment, an order of the New York PSC prohibiting utilities from disseminating in their billing envelopes their views on controversial public issues. This case involves the converse of the issue presented in *Con Edison v. PSC*: may the Public Utilities Commission of the State of California (PUC) compel a public utility (PGandE) to disseminate the messages of a third party in the utility's billing envelopes.

Con Edison believes that a compulsion to speak is as destructive of the freedom of speech as a prohibition against speaking, and it is interested in this case because it wishes to assure that the protections recognized in *Con Edison v. PSC* for the utilities' speech are not diminished.

Con Edison is interested in this case for the additional reason that the New York PSC has adopted an order very similar to the one adopted by the PUC, and the decision in this case may determine the validity of the New York PSC's order.²

²Case 28655, *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes* (N.Y. P.S.C. May 14, 1984), *reh'g denied* (Nov. 14, 1984). The New York PSC's order is reprinted in the appendix to PGandE's jurisdictional statement. J.S. App. A111.

Con Edison and several other New York utilities challenged the New York PSC's order on the grounds that it violates their First and Fifth Amendment rights under the United States Constitution. The New York Supreme Court, Albany County, agreed with the utilities' First Amendment arguments, and it declared the New York PSC's order unconstitutional. *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, No. 10762-84 (April 10, 1985). An appeal to the Appellate Division, Third Department, is pending.

Summary of Argument

The PUC's order implicates PGandE's freedom of speech by diminishing its ability to communicate its own views and by requiring it to disseminate the views of others. The PUC's order, being a content-based regulation of speech, may be upheld only if the PUC can show that its "regulation is a precisely drawn means of serving a compelling state interest." *Con Edison v. PSC*, 447 U.S. at 540. The PUC has not met this burden. The governmental interests it relies upon are either not substantial, are not advanced by its order, or could be served by less restrictive means.

Argument

THE PUC's ORDER REQUIRING PGandE TO DISSEMINATE THE MESSAGES OF A THIRD PARTY IN PGandE's BILLING ENVELOPES VIOLATES PGandE's FREEDOM OF SPEECH.

A. General First Amendment Principles

Content-based regulation of speech is "presumptively unconstitutional," *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), and will be sustained "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983). Such regulation will be upheld "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Con Edison v. PSC*, 447 U.S. at 540.³

In Part C, we shall show that the order under review is a content-based regulation. In Part D, we shall show that the PUC has not established that its order serves a compelling state interest or that its order is a precisely drawn means of achieving its stated purpose. Before turning to these issues, we shall

³The PUC's order suppresses political speech at the core of the First Amendment, J.S. App. A66; some of the speech favored by the PUC will also be political speech at the core of the First Amendment. An order regulating such speech requires the strictest degree of judicial scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

respond, in Part B, to appellees' argument that the PUC's order does not even implicate PGandE's First Amendment rights.

B. The PUC's Order Implicates PGandE's First Amendment Rights.

The PUC's order implicates PGandE's First Amendment rights in two ways. First, it diminishes PGandE's ability to speak by displacing PGandE's messages with the messages of Toward Utility Rate Normalization (TURN) in the extra space in PGandE's billing envelopes.⁴ Second, it compels PGandE to speak when it would rather remain silent.

1. The right to speak

The First Amendment protects the right to speak. *Con Edison v. PSC*. However, the PUC and the other appellees (TURN and others) argue in their motions to dismiss (M.D.) that the order under review does not implicate PGandE's right to speak because PGandE remains free to communicate with its customers on any topic so long as it does so in space other than the extra space in its billing envelopes and pays the additional postage. PUC's M.D. 15-16; TURN's M.D. 5-10.⁵ However, PGandE has been deprived of the use of the extra space in its billing envelopes, and it has long been settled that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939); see

⁴The PUC defined "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to Motion to Dismiss of the PUC (PUC App.) A3. How much of the extra space TURN uses is solely within its discretion. PUC App. A38, ¶ 5(a).

⁵We estimate that under appellees' suggestion, each mailing requiring extra postage would cost PGandE an additional \$630,000. This assumes that PGandE mails each issue of *Progress* to 3.7 million customers (J.S. 4) and that the additional postage for the second ounce of the mailing is 17 cents per customer.

Because the cost of the second ounce of postage is approximately the same as the cost of the first ounce, the economic effect of adopting appellees' suggestion is the same as requiring PGandE to send its messages in a separate envelope. This proposal was implicitly rejected by the Court in *Con Edison v. PSC*.

also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 69 n.18; *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 n.15 (1976).⁶ Thus, the PUC cannot escape strict scrutiny of its order by arguing that PGandE can exercise its right to speak in some other place.

2. The right to remain silent

The First Amendment also protects the right to remain silent. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that a state may not constitutionally require an individual to disseminate an ideological message to which the individual objects:

where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Id. at 717 (footnote omitted).

Compelled dissemination of an ideological message, the Court concluded in *Wooley v. Maynard*, would require the individual to foster an idea he finds objectionable and would violate the individual's right to refrain from speaking. *Id.* at 714-15.⁷

⁶TURN also argues that requiring PGandE to pay the extra postage four times a year is less burdensome than charging PGandE's stockholders all costs of mailing *Progress*, an approach, TURN contends, the PUC could have adopted. TURN's M.D. 9-10. However, it is far from clear that such an approach would be constitutional. This Court expressly left open this question of cost allocation in *Con Edison v. PSC*, 447 U.S. at 543 n.13, and it is presently being considered in *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, 107 A.D.2d 73, 485 N.Y.S.2d 607 (N.Y. App. Div., 3d Dept., Feb. 21, 1985), *appeal pending*.

Moreover, how the costs of mailing *Progress* are allocated between the utility's ratepayers and stockholders has no relevance to the validity of the PUC's order. Under the PUC's order, TURN is entitled to access to PGandE's billing envelopes whether or not PGandE sends *Progress* to its customers.

⁷As the Court observed in *Wooley v. Maynard*, "[t]he right to speak and the right to refrain from speaking are complementary

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (*Miami Herald*), this Court struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. That decision, the Court later said, stands for the principle "that the State cannot tell a newspaper what it must print." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (*PruneYard*).⁸

Appellees argue that PGandE's right to remain silent is not implicated because TURN's views are not likely to be identified with those of PGandE. PUC's M.D. 23-24; TURN's M.D. 21. However, the First Amendment problem with the PUC's order is more fundamental than the mistaken attribution of beliefs;⁹ the problem is governmental coercion to disseminate ideas and the resulting distortion of the marketplace of ideas.

A central purpose of the First Amendment is to protect the marketplace of ideas against governmental interference. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *Con Edison v. PSC*, 447 U.S. at 537-38; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86

components of the broader concept of 'individual freedom of mind.' " *Id.* at 714, quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). See also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 53 U.S.L.W. 4562, 4567-68 (U.S. May 20, 1985); *Minnesota State Board for Community Colleges v. Knight*, 104 S. Ct. 1058, 1079-80 (1984) (Stevens, J., dissenting); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 97-100 (1980) (Powell, J., concurring); *Herbert v. Lando*, 441 U.S. 153, 178 n.1 (1979) (Powell, J., concurring); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

⁸ It is settled that "[t]he liberty of the press is not confined to newspapers and periodicals The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

⁹ There was very little possibility of mistaken attribution of views in either *Wooley v. Maynard* or *Miami Herald*; yet in both cases the Court invalidated state statutes requiring persons to disseminate the views of others.

(1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Of course, the government can distort the marketplace of ideas just as much by restricting the voices of some as by enhancing the voices of others. Accordingly, this Court's decisions have established the principle that "the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council v. Taxpayers for Vincent*, 104 S.Ct. 2118, 2128 (1984); see also *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983). Similarly, in *Buckley v. Valeo*, the Court observed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." 424 U.S. at 48-49. The PUC has clearly engaged in viewpoint discrimination by favoring TURN's views at the expense of the views of PGandE.

C. The PUC's Order Is a Content-based Regulation.

A content-based regulation is one that discriminates for or against certain topics or for or against certain viewpoints within a topic. *Con Edison v. PSC*, 447 U.S. at 537; *Carey v. Brown*, 447 U.S. 455 (1980). In this case, the PUC has engaged in viewpoint discrimination by favoring TURN's speech over the speech of PGandE.¹⁰

TURN is an organization that represents residential utility consumers. PUC App. A17. TURN was not awarded access on an ideologically neutral basis; TURN was given access precisely because of its views as a representative of residential customers.¹¹ By preferring TURN's use of the extra space to

¹⁰ Justice Brennan has characterized viewpoint discrimination as "censorship in its purest form." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 62 (dissenting opinion).

¹¹ The PUC is familiar with TURN's viewpoints. For example, TURN is in favor of keeping "rate of return and evaluation of rate base relatively low." PUC App. A18. TURN will not use PGandE's envelopes to argue that the rates charged to commercial customers are being used to subsidize lower rates for residential customers. Neither

PGandE's on the ground that to do so would be more beneficial to PGandE's customers, PUC App. A22, the PUC has clearly fostered the dissemination of a particular viewpoint. From the standpoint of ideological neutrality, the choosing of the message carrier by the government is as offensive as the choosing of the message.¹²

PruneYard, a decision on which appellees rely heavily, does not require a contrary conclusion. Unlike the situation in this case, access to the shopping center in *PruneYard* was not determined by the identity of the speaker or the content of the message. The Court emphasized in *PruneYard* that there was "no danger of governmental discrimination for or against a particular message." 447 U.S. at 87.¹³ Moreover, contrary to the facts in this case, the speakers' use of the shopping center in *PruneYard* did not interfere with the owner's use of the property. *Id.* at 83.

D. The PUC Has Not Met Its Burden of Showing That Its Order Is a Precisely Drawn Means of Serving a Compelling State Interest.

The Constitution places on the government the burden of justifying its regulation of speech. *First National Bank of Boston v. Bellotti*, 435 U.S. at 786. This Court has determined that the government's justifications must be subjected to strict and exacting judicial scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 294; *Police Department of City of*

will it advance any other proposition it would regard as adverse to the interests of residential customers.

¹² A municipality that allowed only one political party to use the public parks to seek new members could hardly answer a claim that it was violating the First Amendment by arguing that its action was ideologically neutral because it was not prescribing the messages of the chosen speaker.

¹³ The PUC and TURN both argue that the order under review does not restrict PGandE's speech on the basis of its content. PUC's M.D. 17; TURN's M.D. 11-13. The Court responded to this argument in *Miami Herald* by noting that it "begs the core question. Compelling editors or publishers to publish that which 'reason' tells them should not be published' is what is at issue in this case." 418 U.S. at 256.

Chicago v. Mosley, 408 U.S. 92, 99, 101 and n.8 (1972); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963).

The PUC offers several purported justifications in support of its order. PUC's M.D. 17-18.¹⁴ However, it has not come forward with any evidence in support of these justifications. Invalidation of its order is required for this reason alone. *First National Bank of Boston v. Bellotti*, 435 U.S. at 789. Moreover, the governmental interests relied upon by the PUC are either not substantial, are not advanced by its order, or, as shown by PGandE in its brief, could be served by less restrictive means. Finally, the PUC's principal justifications (fuller understanding of issues by consumers and increased participation by them in PUC proceedings) are so vague that they are not susceptible of judicial review. If the PUC could meet its burden of proof merely by invoking such general objectives, freedom of speech would cease to exist. We shall now show that each of the PUC's asserted justifications for its order must be rejected.

1. Fuller understanding of energy- and regulatory-related issues by consumers

The PUC argues that its order "furthers the fuller understanding of energy- and regulatory-related issues by consumers." PUC's M.D. 17. The PUC has not demonstrated that this is a compelling state interest. There is no discussion by the PUC of the existing level of consumer understanding of energy- and regulatory-related issues by consumers, of why an increase in such understanding is necessary, of the extent to which such understanding ought to be increased, and of how TURN will fulfill this function.

More fundamentally, with the exception of the special case of the broadcast medium, this Court has repeatedly rejected the argument that a better informed public is an adequate justification for infringing speech. In *Con Edison v. PSC*, the Court

¹⁴ TURN has advanced most of these same justifications. TURN's M.D. 13-15.

rejected the New York PSC's asserted justification that its order will allow utility customers to receive more "'useful' information." 447 U.S. at 537. In *Wooley v. Maynard*, the Court rejected New Hampshire's asserted justification that its statute "promotes appreciation of history, individualism, and state pride." 430 U.S. at 716.

The PUC's argument falls into familiar patterns. It asserts that displacing PGandE's messages with TURN's messages will benefit PGandE's consumers by exposing them to a wider variety of views. But achieving this goal by governmentally coerced dissemination of information "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald*, 418 U.S. at 254 (footnote omitted). Similarly, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley v. Valeo*, 424 U.S. at 48-49.¹⁵

2. Increased consumer participation in PUC proceedings

The PUC's second asserted justification for its order is that it promotes increased consumer participation in PUC proceedings. PUC's M.D. 17. This justification is no more compelling, no more specific, and is supported by no more evidence than the PUC's first asserted justification. For example, the PUC has neither explored the extent of existing consumer participation in its proceedings nor has it justified increasing the level of such participation. The fact is that the level of consumer participa-

¹⁵ The PUC makes the related claim that its order is justified by reliance on the customers' right to receive ideas and information. PUC's M.D. 17-19. However, except in the case of the broadcast medium, this Court has never recognized a right to receive information absent a willing sender of information. The right-to-receive cases protect the communication against governmental interference; they do not create a right to force unwilling speakers to send information. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141 (1943).

tion in PUC proceedings is already extraordinarily high. Forty-seven parties, including TURN, representing every conceivable point of view, participated in PGandE's 1982 rate case. Decision 93887, 7 CPUC 2d 349, 519-20 (1981). Indeed, with far less participation in its proceedings, the New York PSC asked "whether there is a legitimate need for additional ratepayer representation." Case 28655, *Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility Board*, Order Instituting Proceeding 3 (Oct. 7, 1983).

3. Remedy for violation of PURPA

The PUC's third asserted justification for its order is that it provides a remedy for PGandE's violation of PURPA. PUC's M.D. 18.¹⁶ This asserted justification should be rejected for several reasons.

First, the PUC is in error in concluding that "PGandE had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions." PUC App. A3. PURPA is addressed to state regulatory authorities and requires them to *consider* adopting the advertising standard. However, as this Court made clear, "no state authority . . . is required to adopt or implement" the advertising standard. *FERC v. Mississippi*, 456 U.S. 742, 749-50 (1982). If the state regulatory authority decides to adopt the PURPA advertising standard, it will exclude from the utility's revenue requirement the cost of political advertising. However, as the legislative history of PURPA makes clear, "[a]doption of the [advertising] standard does not prohibit any utility from engaging in [political] advertising. The standard merely specifies who is to pay for the advertising." *Joint Explanatory Statement of the*

¹⁶ The PUC is referring to the advertising standard of Section 113 of PURPA, 16 U.S.C. § 2623(b)(5) (1982), which provides that No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as defined in section 2625(h) of this title.

Committee of Conference, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 63, 77, reprinted in 1978 U.S. Code Cong. & Ad. News 7797, 7811. The PURPA advertising standard is violated by charging higher rates than allowed by the state regulatory authority; it is not violated by conducting political advertising. There is no allegation that PGandE charged higher rates than allowed by the PUC.

Second, if there be a violation of the advertising standard of PURPA, the remedy contemplated by PURPA is a reduction of the utility's rates and not an infringement of its freedom of speech.¹⁷ An appropriate rate adjustment, rather than an infringement of speech, is also the constitutionally permissible answer to any forced subsidy argument. *Con Edison v. PSC*, 447 U.S. at 543.

Finally, if the PUC's order is to be construed, as the PUC suggests, as requiring PGandE to disseminate TURN's messages as a penalty for PGandE's dissemination of its own messages, the order violates *Miami Herald* by exacting a penalty from PGandE on the basis of the content of its speech. 418 U.S. at 256.

4. Halting misappropriation by PGandE of an asset belonging to the ratepayers

The PUC's fourth asserted justification for its order is that it halts misappropriation of an asset belonging to the ratepayers and prevents "unjust enrichment" by PGandE. PUC's M.D.

¹⁷ It is far from clear that recovery of the minimum necessary cost of providing service, PUC App. A3, is a violation of the PURPA advertising standard. The existence of extra space in the utility's billing envelope does not add a penny to the cost of providing utility service. J.S. App. A67. Thus, the utility's use of that extra space does not require ratepayers to subsidize the utility. In any event, if PURPA is construed as permitting disallowance of a portion of the postage costs when the utility uses the extra space for political advertising, at no additional cost to ratepayers, then PURPA is of questionable constitutionality. *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, 307 A.D. 2d at 77, 485 N.Y.S. 2d at 611 (Main, J.P., dissenting).

18.¹⁸ This asserted justification should be rejected because the extra space does not belong to the ratepayers and, even if it did, the remedy adopted by the PUC is patently underinclusive.

The PUC reasoned that the extra space in utility billing envelopes belongs to ratepayers because its cost is included in the utility's revenue requirement. J.S. App. A72, ¶ 58.¹⁹ However, it has long been established that

¹⁸ Appellees argue that because the PUC's determination as to the ownership of the extra space was made in a prior PUC proceeding, that determination is "*res judicata*" and is not properly challenged on this appeal. PUC's M.D. 8-9; TURN's M.D. 18-19. This contention is in error. In the prior proceeding, the PUC determined only that the extra space in utility billing envelopes is "properly considered as ratepayer property." Decision 93887, J.S. App. A72, ¶ 58. In the prior case, the PUC did not take any action to implement this conclusion; rather, it contemplated further proceedings. *Id.* at A71, A72, ¶ 60; PUC App. A33, ¶ 5. ("This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.") There was no final judgment in the prior case, which is a predicate to this Court's jurisdiction. 28 U.S.C. § 1257 (1982). Thus, review of the ownership question in this Court could not have been obtained prior to this appeal, and the issue is properly presented on this appeal.

¹⁹ We should note that although the PUC *claims* that the extra space is ratepayer property, it has not *treated* the extra space as such property. The PUC has granted access to the extra space to some customers, but denied access to others. Decision 84-10-062 (Oct. 17, 1984), J.S. App. A157. Even those customers that have been granted access to the extra space have only a limited right to the use of such space, and they have such right only for two years. PUC App. A38. Moreover, such customers have no right to sell, lease, transfer or exercise any other incident of ownership as to such extra space.

The PUC's granting of access to the extra space to some customers, but not to others, constitutes an additional basis for reversal of the judgment of the court below. The statutes pursuant to which the PUC is acting, PUC App. A57-59 are so vague as to provide no standards to the PUC in exercising its discretion. *Niemotko v. Maryland*, 340 U.S. 268, 271-73 (1951); *Lovell v. Griffin*. See also L. Tribe, *American Constitutional Law* 733-34 (1978). ("[T]he Supreme Court has consistently [invalidated] statutes containing essentially standardless delegation in areas affecting first amendment rights.")

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 32 (1926). More recently, in *Con Edison v. PSC*, the Court followed this rule when it recognized that the billing envelope was the utility's property. 447 U.S. at 540.

A state may not deprive a utility of its property simply by redefining property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). Moreover, "a State, by *ipse dixit*, may not transform private property into public property without compensation. . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Even if it be assumed that the extra space in the utility's billing envelope were ratepayer property, the remedy adopted by the PUC is patently underinclusive. The fact that a particular type of property has been singled out for special treatment by the PUC "undermines the likelihood of a genuine state interest" in protecting against "unjust enrichment" of the utility. *First National Bank of Boston v. Bellotti*, 435 U.S. at 793. There is extra space in most, if not all, types of utility property: buildings, trucks, computers, office equipment, electrical equipment and many others. Yet, the PUC has done nothing to capture the value of the extra space in these properties for the benefit of ratepayers.²⁰ Moreover, the remedy adopted by the PUC is ineffective even in capturing the extra space in the billing envelopes. PGandE is allowed to use any extra space not used by TURN during the "TURN months," and it is also allowed to use the extra space in sixteen

²⁰ The suggestion that access be given to the public in the extra space on trucks was found unacceptable by this Court even as to the government's property. *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2134 n.31.

of the twenty-four months during which TURN does not have access.

5. Promotion of fair and efficient rates

The PUC's final asserted justification for its order is that it promotes fair and efficient rates. PUC's M.D. 18. The PUC's order simply has nothing to do with rates. PGandE's rates are not affected at all by the PUC's order.²¹

²¹ The PUC also argues that its extensive regulation of PGandE justifies its order. PUC's M.D. 9-14. This argument was squarely rejected by the Court in *Con Edison v. PSC*, 447 U.S. at 533-34 and n.1.

CONCLUSION

The judgment of the Supreme Court of California violates PGandE's freedom of speech; it should be reversed.

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